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SUMMARY RECORD OF THE 595th MEETING

Held at Headquarters, New York,
on Wednesday, 5 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

CONTENTS

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421)

Article "x" (continued)

1. Mr. SORIEUL (International Trade Law Branch) recalled that the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication had been designed in modular form, with the first module comprising general rules and the other modules setting forth more specific rules to remove obstacles to the use of EDI in specific areas of trade law. Thus far, the only module containing specific rules was the so-called article "x", which appeared in the annex to the latest report of the Working Group on Electronic Data Interchange (EDI) (A/CN.9/421). Paragraph 60 of that report set forth the Working Group's proposal to divide the Model Law into Part I (general rules) and Part II (specific rules, including article "x"). That proposal had the virtue of maintaining structural coherence and facilitating the addition of further industry-specific provisions in the future.

2. Mr. SANDOVAL LÓPEZ (Chile) said he fully supported the Working Group's proposal. Article "x" should not be placed in an annex to the Model Law because annexes were usually considered to be of secondary importance; consequently, a Government might adopt the main body of the Model Law but not the annex.

3. Mr. CHANDLER (United States of America) said he agreed that article "x" should form part of the main body of the Model Law. He was concerned about the statement made by Pakistan the previous day, to the effect that it could not support the rules in article "x" because they overrode the provisions of various international conventions. The Working Group had taken care not to override any such provisions; article "x" was intended only to fill a vacuum in the laws governing contracts of carriage.

4. Mr. LLOYD (Australia) and Mr. HOWLAND (United Kingdom) said they supported the Working Group's proposal on the placement of article "x".

5. Mr. MASUD (Observer for Pakistan) said paragraphs 2 and 5 of article "x" overrode certain rules of law by changing the way in which they were applied. Moreover, in cases where States parties to conventions requiring that certain information should be presented in writing had enacted domestic legislation to give effect to those provisions, the rules in the Model Law would create complications by requiring those States to change such legislation.

6. Mr. SORIEUL (International Trade Law Branch) said the Model Law, by definition, could not override or conflict with international conventions or national legislation because it was only a proposal to States. Moreover, instruments such as The Hague Rules could not have foreseen the technological developments which had led to the use of EDI; as noted by the United States, the Model Law was intended to fill that vacuum in existing law. Essentially, the Model Law provided new rules on how to interpret, in the light of EDI, the

provisions of conventions and national legislation that required information to be presented in writing.

7. Mr. CHOUKRI (Observer for Morocco) said article "x" was within the purview of the Model Law, since it concerned some of the commercial activities mentioned in article 1 thereof, and should therefore be included in the main body of the Law. However, article "x" was too long; its five paragraphs should be considered five separate articles.

8. Mr. ZHANG Yuqing (China) said his delegation had proposed placing article "x" in an annex to the Model Law so that it would not appear to limit the scope of that Law, which encompassed all international electronic transactions. With the further development of EDI, more annexes could be added. However, he did not object to the secretariat's proposal. In any case, it must be clarified that the Model Law applied to all EDI transactions and not only to specific areas such as maritime transport.

9. Mr. CHANDLER (United States of America) said if anything in the Model Law appeared to interfere with national legislation or to override international conventions, a State could simply decide not to make use of it. The Model Law was intended only to complement national laws in order to facilitate EDI.

10. Mr. MADRID (Spain) said article "x" should be divided into at least two articles, since the first paragraph was very long, and only indicated what matters were covered. The article should be called a "chapter", and each paragraph should be a separate article thereunder. That would make the structure of Part II of the Model Law consistent with that of Part I.

11. Mr. TELL (France) said making article "x" Part II of the draft Model Law was preferable to simply including it as an annex, because the general provisions in articles 6 and 7 of the Model Law would then be equally applicable to it.

12. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said no further additions should be made to the general rules; article "x" should be placed in an annex to the Model Law.

13. Mr. GILL (India), supported by Mr. KOIDE (Japan) and Mr. SCHNEIDER (Germany), said that as article "x" appeared to perform the same function as the "rules" sections of other model laws, it should be included in the Model Law as Part II.

14. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said adoption of article "x" in the form of an annex, as proposed by Morocco and China, appeared to conflict with the provisions of article 1 of the Model Law concerning universality of application of that Law.

15. The CHAIRMAN said there appeared to be a consensus that article "x" should be included in the draft Model Law as Part II, rather than as an annex, in order to avoid raising doubts about its legal value or relevance to the rest of the Model Law.

16. Mr. TALICE (Uruguay) said the structure of article "x" when incorporated into the Model Law, should be consistent with that of the rest of the Law. Dividing chapter II into two sections, the first dealing with contracts of carriage and the second with other topics as necessary, would allow for the possibility of including articles on other subjects.

17. Mr. SANDOVAL LÓPEZ (Chile) said he supported the proposal of the Spanish delegation, bearing in mind that the second part of the Model Law would have to refer to specific provisions. The Uruguayan proposal would have the effect of creating certain functions not paralleled in other articles.

18. Mr. CHANDLER (United States of America) said his delegation supported the Spanish delegation's proposal, and was prepared to accept the advice of the secretariat with regard to the specific form in which article "x" was to be incorporated in the Model Law.

19. Mr. SORIEUL (International Trade Law Branch) said that while paragraph 1 of article "x" could perhaps be treated as a separate article, doing so with each of the other paragraphs of the article would result in creating a section whose form was inconsistent with the rest of the Model Law. He therefore recommended that the drafting group should be instructed to study the incorporation of article "x" in two segments, with the first comprising the current paragraph 1 outlining the scope of application, and the second comprising the rest of the article.

20. Mr. CHANDLER (United States of America), supported by Mr. HOWLAND (United Kingdom) and Mr. CHOUKRI (Observer for Morocco), suggested adding the words "or statement" after "notice" in paragraph 1, subparagraph (d), and deleting the words "irrevocably or not" in subparagraph (e).

21. The CHAIRMAN said there appeared to be a consensus in favour of the United States proposal regarding subparagraphs (d) and (e).

The meeting was suspended at 11.30 a.m. and resumed at noon.

22. Mr. HOWLAND (United Kingdom) noted the word "requires" at the beginning of article "x", paragraph 2, could be taken to mean either an obligation or a condition for being valid and enforceable. As the Working Group had realized, the phrase "or provides for certain consequences if it is not ..." could be interpreted to mean the opposite of what was intended. He therefore proposed that that phrase should be deleted and the following sentence added at the end of the paragraph: "This paragraph applies whether the requirement imposes an obligation or whether it is a condition of the validity, effectiveness or enforceability of the action."

23. Mr. ANDERSEN (Observer for Denmark) expressed his concern that article "x" should be consistent with the text of the entire Model Law. The phrase which the United Kingdom representative had proposed for deletion appeared in article 5 and elsewhere. Thus, it might be appropriate to add the sentence just proposed to article 5 as well. He requested clarification from the secretariat.

24. Mr. SORIEUL (International Trade Law Branch) said article "x" had been drafted taking into account other provisions of the Model Law. Upon closer consideration, the Working Group had realized that the phrase "or provides for certain consequences if it is not ...", taken from article 5 was not really sufficient. If consequences ensued when an action was not in writing, it was not logical to say that the rule of law was satisfied by using a data message. In fact, the Commission agreed on the principle that a data message could replace something in writing in all cases but must now verify whether the phrase "or provides for certain consequences if it is not" was effective in article "x". If it determined that an alternative, such as the United Kingdom proposal, was necessary, the rest of the Model Law would have to be reviewed for consistency.

25. Mr. CHANDLER (United States of America) said he agreed that paragraph 2 - and probably a number of general provisions of the Model Law - contained huge flaws in logic. It made no sense to say that a rule of law was "satisfied"; at best a condition or requirement was satisfied. He agreed with the United Kingdom representative that the phrase "or provides for certain consequences if it is not ..." should be deleted. However, the sentence which the United Kingdom proposed should be added at the end of the paragraph might not solve the problem. It would be much simpler to amend the paragraph by deleting the word "requires" after "Where a rule of law" and replacing it by the words "either by requirement or by consequences, makes it a condition that any action ...". At the end of the paragraph, "rule " would be replaced by "condition".

26. Mr. LLOYD (Australia) said he agreed that there was a problem with the drafting of paragraph 2 and perhaps with articles 5, 6 and 7 of the Model Law as well. He had a slight preference for the United Kingdom proposal over the proposal just made by the United States. If the Commission could agree on a solution in principle, the wording could be left to the drafting group.

27. Mr. HOWLAND (United Kingdom) acknowledged that the amendment he had proposed might necessitate parallel changes in other provisions of the Model Law. If changes had to be made in a number of places, perhaps economy of language could be achieved by adding a paragraph to the definitions in article 2.

28. Mr. ANDERSEN (Observer for Denmark) said he was satisfied by the secretariat's explanation. Perhaps it was not necessary to state explicitly conditions and the consequences, as the United States had proposed, since they could be easily inferred from the fundamental principles of the application of law. The United Kingdom proposal was very much in line with the tenor of the Model Law and could be incorporated into articles 5 and 6 as well. If explanations were necessary, they could be included in the Guide to Enactment.

29. Mr. MADRID (Spain) said he agreed that more appropriate language was necessary in paragraph 2. As long as the Commission agreed on the substantive issue, either of the two proposals was acceptable. The wording of the paragraph could be left to the drafting group.

30. Ms. EKEMEZIE (Nigeria) said she agreed that paragraph 2 was flawed and should be referred to the drafting group.

31. Ms. REMSU (Observer for Canada) said she, too, recognized that there was a flaw in logic in paragraph 2, which could be dealt with by the drafting group. The United States proposal was preferable to the United Kingdom proposal.

32. The CHAIRMAN confirmed that paragraph 2 would be submitted to the drafting group for clarification.

33. Mr. HOWLAND (United Kingdom) said the aim of paragraph 3 of article "x" was to avoid any danger of duplication in the transfer of rights and obligations by two different means, so that in a series of transactions relying on data messages where a subsequent party made use of a paper document there must be a demonstrable assurance that the prior method of data message transmission was cancelled. In fact, paragraph 4 of the article provided the essential guarantee of singularity, so that his delegation would prefer to see the substance of existing paragraph 3 follow on from that of paragraph 4.

34. Mr. CHANDLER (United States of America) said his delegation would not object to moving paragraph 3, which, he proposed, should be amended by the insertion of a new second sentence, reading: "Any paper document issued shall contain a statement of such termination."

35. Mr. HOWLAND (United Kingdom) supported that amendment.

36. Mr. LLOYD (Australia) said his delegation had no objection to the United States amendment. There were, however, two difficulties with paragraph 3. The reference to "such actions" in the first sentence was illogical, since the actions had already been effected by data message, and the sentence must really mean actions of the type referred to in paragraph 1, subparagraphs (f) and (g), and not the actual actions already effected by data message. Similarly, the use of the word "substitution" in the second sentence really meant that following termination, paper must be used; there was no question of substitution of what had already been done. The current wording gave an unintended impression.

37. Mr. MADRID (Spain) said his delegation supported moving existing paragraph 3. As currently worded, that paragraph only partially addressed any doubts that might arise for third parties in connection with the use of paper documents as to whether there had previously been a data message. The United States proposal would provide added certainty. He would welcome clarification, however, as to whether that amendment would mean that in every case a statement would be required indicating that there was no parallel data message, or if the procedure it outlined, would be employed only where electronic means had previously been used, in which case in the absence of any statement the situation would not be clear to third parties, since the statement could simply have been omitted.

38. Mr. CHANDLER (United States of America) said such doubts existed in many areas. There was, for example, no way to guarantee that a carrier issued only one bill of lading; even if a bill of lading indicated that no electronic data interchange method was involved, that might not be the case. Such an instance would, of course, constitute fraud, which would give rise to liability. All that the Commission could do was to provide that where parties had a choice of opting out of the electronic system they would be warned that there might have

been a previous electronic transaction. There was no universal way to address the problem, and the Commission should take care not to restrict the system unnecessarily, but should merely ensure that where electronic use was terminated, subsequent documentation indicated that fact.

39. The CHAIRMAN suggested that interested delegations might wish to formulate a revised draft of the paragraph.

40. Mr. HOWLAND (United Kingdom) said that, on the assumption that paragraph 4 would refer to the necessity of reliable assurance, his delegation proposed that paragraph 3 could be reformulated to provide that an assurance should not be sufficient for the purpose of paragraph 4 unless it included reliable assurance that if the right or obligation had been conveyed by a person by means of a paper document it could not also be conveyed by the same person by means of a data message subsequently or concurrently, and unless the method used to give such assurance was specified to the person to whom the right or obligation was to be conveyed. Such a formulation would reflect the essence of paragraph 3 and the concern that a recipient must be given clear notice where data messaging had been cancelled.

41. Mr. TELL (France) said the United Kingdom proposal still left unresolved the question of when any change from one means to the other was to take place. The Commission might consider whether a party should be prohibited from making a change from electronic means to the use of paper documents. He inquired what the rationale was for the emphasis in the United Kingdom proposal on one means or the other.

42. Mr. HOWLAND (United Kingdom) said the fundamental security being sought was a guarantee of singularity, so that rights and obligations could be transferred to one person only and not to a multiplicity either initially or subsequently, which would constitute fraud. Accordingly, electronic messaging must be used in such a way as to prevent duplication. In particular, where a party required a paper document in a series of transactions that had begun with a data message there must be an assurance that there was no duplication and that data messages would not continue to be used as well. The Working Group had felt that the need for security was so important that it should be set out in a paragraph of its own, since commercial operators using electronic data messages and paper needed a clear assurance that no duplication was possible regarding the transfer of rights and obligations.

43. The CHAIRMAN said there appeared to be no objection to moving paragraph 3 to follow paragraph 4.

The meeting rose at 1.05 p.m.